

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1086

B
P/s

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
NO. T-3014

RALPH ALSWANG, HYDRA-FLOAT STAGE
SYSTEMS CORP., a Connecticut Corp-
oration, and THEATER PLANNING AS-
SOCIATES, INC., a Connecticut Corp-
oration,

Appellant,

- v. -

WILLIAM M. CRUSE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANT

RICHARD L. ALBRECHT
10 Middle Street
Bridgeport, Connecticut 06604

Attorney for Appellant



INDEX

	Page
Jurisdiction	1
Questions Presented	1
Statement of the Case	2
Summary of Argument	5
POINT I	
Judge Newman abused his discretion in denying defendant's motion to disqualify plaintiff's attorney because in the course of his prior representation of defendant Hydra-Float, Bissell might have acquired information related to the subject of his representa- tion of plaintiff in this action	5
POINT II	
Judge Newman abused his discretion by failing to conduct a hearing to determine whether Bissell did in fact receive information as a result of representing Hydra-Float which would not otherwise have been available to him	8
CONCLUSION	9

TABLE OF CASES

	Page
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 . . .	1
Consolidated Theaters, Inc. v. Warner Bros. Management Corp., 216 F. 2d 920 (2d Cir. 1954)	6
Cord v. Smith, 338 F. 2d 516 (9th Cir. 1964)	8
E. F. Hutton & Company v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969)	6
Fleischer v. A. A. P., Inc., 164 F. Supp. 548 (S.D.N.Y. 1958)	
Richardson V. Hamilton International Corporation, 469 F. 2d 1382 (3rd Cir. 1972)	6
T. C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953)	6, 7
Traylor v. Amarillo, Texas, 335 F. Supp. 423 (N.D. Tex. 1971)	6
United States v. Standard Oil Company, 136 F. Supp. 345 (S.D.N.Y. 1955)	5

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
NO. 74-1086

RALPH ALSWANG, HYDRA-FLOAT STAGE
SYSTEMS CORP., a Connecticut Corp-
oration, and THEATER PLANNING AS-
SOCIATES, INC., a Connecticut Corp-
oration,

Appellant,

- v. -

WILLIAM M. CRUSE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANT

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. §1292(a) which provides in pertinent part that "the courts of appeal shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States. . . refusing. . . injunctions"; by the so-called "Cohen Rule", derived from Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541; and alternatively, by the All Writs Act, 28 U.S.C. §1651.

Questions Presented

1. Was it improper for Jon O. Newman, United States District Judge for the District of Connecticut, to deny defendant's motion for an order that Henry M. Bissell be disqualified as attorney for the plaintiff in this case; for an order that Henry M. Bissell shall not, at any time, directly or indirectly or whether as attorney of record or not, represent, counsel or

advise the plaintiff, William M. Cruse, in connection with the subject case; and for an order directing Henry M. Bissell be enjoined from making available to the plaintiff or other counsel for the plaintiff, any part of his files which contain information about the subject matter of this case?

2. Was is improper for Judge Newman to rule on defendant's motion to disqualify and other orders in the absence of conducting a testimonial hearing as requested by the movant?

Statement of the Case

This is an appeal from the ruling of Judge Jon O. Newman denying defendant's motion to disqualify plaintiff's attorney, Henry M. Bissell, from participating in this civil suit, or making available any of his files concerning the subject matter of the case, on grounds that Mr. Bissell has acted as attorney for the defendant Hydra-Float Stage Systems, Inc. (hereafter "Hydra-Float") and therefore has a conflict of interest. The suit seeks monetary damages and injunctive relief for breach of contract, patent infringement, breach of fiduciary obligation, and fraud, and requests declaratory relief, an accounting, appointment of a receiver, and a declaration of a constructive trust.

In July, 1969, defendant Ralph Alswang entered into a partnership agreement with plaintiff Cruse to do business as Hydra-Float Stage Systems for the purpose of developing, promoting and marketing a certain invention, which was granted United States Patent No. 3,558,102. At about that time, plaintiff Cruse granted this partnership an exclusive license to manufacture, use,

and sell devices incorporating this invention (App. 4-5).

On August 11th, 1969, Cruse conveyed all his right, title and interest in this invention to the partnership doing business as Hydra-Float Stage Systems. The document providing for the assignment indicates that the specifications for this patent had been prepared and executed by Henry M. Bissell (App.5).

In March, 1970, Hydra-Float Stage Systems Corp. was formed in Connecticut. On April 2, 1970, the partnership, doing business as Hydra-Float Stage Systems, conveyed to the new corporation, Hydra-Float Stage Systems Corp., full and exclusive right, title and interest in and to any invention, patents, applications for patents and other assets of the partnership in exchange for the issuance of certain stock of the said corporation (App.5).

From the time of the incorporation of Hydra-Float Stage Systems Corp., in March, 1970, to January, 1973, Henry M. Bissell has acted as attorney and counsel for that corporation on matters that are substantially related to the issues in the pending case. For example, Mr. Bissell advised Hydra-Float Stage Systems with regard to whether its proposed certificate of incorporation was broad enough to cover both foreign and United States patents, patent applications, copyrights and trade rights (App. 11-12). Mr. Bissell also advised Hydra-Float with regard to the Mole-Richardson Agreement, the subject of the fourth cause of action as set forth in paragraph 28(c) (e) (f) and (i) of plaintiff's complaint (App. 13-16). There are also numerous bills and other letters submitted by Mr. Bissell to the corporations (App. 5-39).

On information and belief, Mr. Bissell owns an interest in the patents that are the subject of this litigation. This information and belief is predicated on a letter dated December 18th, 1971 (App. 40-41). Mr. Bissell never disclosed this information to defendant Alswang, who learned of this only after the action was commenced (App. 6).

Judge Newman denied defendant's motion to disqualify Mr. Bissell even though he acknowledged that Mr. Bissell might have had access to information substantially related to the subject matter of this suit because Judge Newman found that Mr. Bissell's access to information was the result of his representation of the plaintiff, Cruse, irrespective of any services rendered to Hydra-Float (App. 111), and because disqualification of Mr. Bissell would have little practical effect on this litigation because the claim of conflict of interest is made only with respect to Hydra-Float (App. 111). However, Judge Newman also acknowledges that to the extent that defendants may succeed in showing at some later stage in the proceedings that Bissell received information as a result of representing Hydra-Float that would not have otherwise been available, grounds for disqualification may exist (App. 113). He also noted that the question of whether he must be disqualified if he is called as a witness may also require resolution (App. 113). No hearing was held to determine whether Mr. Bissell did in fact receive information as a result of representing Hydra-Float that would not have otherwise been available, or whether he must be disqualified if he is called as a witness.

Summary of Argument

Judge Newman abused his discretion in denying defendant's motion to disqualify plaintiff's attorney, Bissell, because he acknowledges that Bissell might have acquired information related to the subject of his representation of plaintiff in this action as a result of his prior representation of defendant Hydra-Float, which information would not have been available to Bissell from his prior representation of plaintiff Cruse.

Judge Newman abused his discretion by failing to conduct a hearing to determine whether Bissell did in fact receive information as a result of representing Hydra-Float that would not otherwise have been available to him.

I

Judge Newman Abused His Discretion in Denying Defendant's Motion to Disqualify Plaintiff's Attorney Because in the Course of his Prior Representation of Defendant Hydra-Float, Bissell Might Have Acquired Information Related to the Subject of his Representation of Plaintiff in this Action

When an attorney represents a party suing a former client, an important question of professional ethics is raised, and the standard for assessing conflict of interest is a rigorous one. A strict standard is supported by the interest in promoting and protecting uninhibited confidential communications between attorney and client, and the need to inspire and maintain public confidence in the legal profession. United States v. Standard Oil Company, 136 F. Supp. 345, 355 (S.D.N.Y. 1955); Note, "Disqualification of Attorney for Representation of Interests Adverse to Former Client", 64 Yale L.J. 917, 927-928 (1955).

The test is "whether it can be reasonably said that in

the course of the former representation the attorney might have acquired information relating to the subject of his subsequent representation." T.C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 269 (S.D.N.Y. 1953) (emphasis supplied). It is the appearance of conflict of interest, not the actuality, that the test seeks to prevent. Fleischer v. A.A.P., Inc., 164 F. Supp. 548, 553 (S.D.N.Y. 1958). Disqualification results from the position of the attorney in relation to the former client, not from actual disclosure by the client of confidential material. E.F. Hutton & Company v. Brown, 305 F. Supp. 371, 393-95 (S.D. Tex. 1969); see also, Consolidated Theaters, Inc. v. Warner Bros. Circuit Management Corp., 216 F. 2d 920, 925 (2d Cir. 1954).

As applied to this case, these principles require defendant Hydra-Float to show only that Bissell might have acquired information related to the subject of his representation of plaintiff, Cruse, in this action, as a result of his prior representation of defendant Hydra-Float. Furthermore, it is not necessary that Bissell represented Hydra-Float with respect to the specific issues in this litigation. Traylor v. City of Amarillo, Texas, 335 F. Supp. 423 (N.D. Tex. 1971); it is not necessary to show that Bissell acquired information in his former representation of Hydra-Float which is to be used in the pending action. Richardson v. Hamilton International Corporation, 469 F. 2d 1382, 1385 (3rd Cir. 1972). In addition, such conflict of interest may be established by reasonable inference rather than by direct evidence. Consolidated Theaters, Inc. v. Warner Bros. Circuit Management Corporation, 216 F. 2d 920 (2d Cir. 1954).

In Judge Newman's Ruling, he notes that "Bissell may have had access to information substantially related to the subject matter of this suit" (App. 122). However, Judge Newman also indicates that in his opinion Bissell's access to information resulted from his representation of plaintiff, Cruse, irrespective of any services rendered to Hydra-Float (App. 122). Yet Judge Newman acknowledges that "to the extent that defendant may succeed in showing at some later stage in the proceedings, that Bissell received information as a result of representing Hydra-Float that would not have otherwise been available, grounds for disqualification may exist" (App. 124).

By making this statement, Judge Newman recognizes that Bissell may very well have acquired information substantially related to the subject matter of this suit as a result of his former representation of Hydra-Float. While it is possible that Bissell's access to this information was the result of his representation of the plaintiff, Cruse, and that he did not receive information as a result of representing Hydra-Float that would not have otherwise been available, such possibility, without more, provides an insufficient basis to conclude that a sufficient conflict of interest to warrant disqualification has not been established.

Thus, the T.C. Theater Corp. test has met, because, as Judge Newman acknowledges in his Ruling, Bissell might have acquired information relating to the subject of his representation of plaintiff Cruse in this action as a result of his prior representation of Hydra-Float, which information would not

otherwise have been available. Therefore, Judge Newman abused his discretion in denying defendant's motion to disqualify Bissell.

II

Judge Newman Abused His Discretion by Failing to Conduct a Hearing to Determine Whether Bissell Did In Fact Receive Information as a Result of Representing Hydra-Float Which Would Not Otherwise Have Been Available To Him.

Even if this court should not find that Judge Newman abused his discretion in denying defendant's motion to disqualify Bissell based upon the information already available to him, this court should find that he abused his discretion by failing to hold a hearing on the issue which he recognizes is dispositive of this motion.

Judge Newman states in his Ruling that "to the extent that defendants may succeed in showing at some later stage of the proceedings that Bissell received information as a result of representing Hydra-Float that would not otherwise have been available, grounds for disqualification may exist. Similarly, the question of whether he must be disqualified if he is called as a witness may also require resolution."

Delay in determining whether Bissell did, in fact, receive such information independent of his representation of Cruse will frustrate the very purpose of the ethical rule regarding conflict of interest. As the court stated in Cord v. Smith, 338 F.2d 516, 521-22 (9th Cir. 1964): "Continued participation as an attorney, by one who is disqualified by conflict of interest from doing so, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation

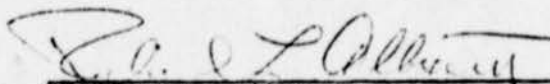
cannot undo the damage that will have been done as a result of such participation." It will be impossible to undo the effect of Bissell's representation of Cruse between the time of Judge Newman's Ruling and an eventual finding that Bissell did, in fact, receive information related to this suit independent of his prior representation of Cruse.

Therefore, it was incumbent upon Judge Newman to make a determination regarding whether Bissell did receive such information, and a Ruling on defendant's motion to disqualify in the absence of any hearing to determine that question was an abuse of discretion.

CONCLUSION

For the reasons stated, defendant respectfully requests this court to reverse the decision of the district court denying defendant's motion to disqualify Henry M. Bissell and, alternatively, to remand this motion to the district court for a hearing to determine whether Bissell received information as a result of representing Hydra-Float that would not otherwise have been available to him.

Respectfully Submitted,



Richard L. Albrecht
Cohen and Wolf
10 Middle Street
Bpt., Conn. 06604

Attorney for Appellant

STATE OF CONNECTICUT)
) ss. BRIDGEPORT
COUNTY OF FAIRFIELD)

Richard L. Albrecht, being first duly sworn, says: That affiant, whose address is 10 Middle Street, Bridgeport, Connecticut 06604, is a citizen of the United States, a resident of the county where the herein described mailing took place; over the age of 18 years and not a party to the above entitled action. That affiant served two copies of the attached BRIEF FOR APPELLANT and one copy of the attached APPENDIX in said action, by placing a true copy thereof in an envelope addressed as follows: MELVIN I. STOLTZ, Mattern, Ware and Davis, 855 Main Street, Bridgeport, Connecticut 06603, sealed and deposited on the 27th day of February, 1974, in the United States mail at United States Post Office, 120 Middle Street, Bridgeport, Connecticut 06604, with postage fully prepaid thereon, and there is regular communication by mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me
this 27th day of February, 1974.

Judith A. Vigliotti

Notary Public

Judith A. Vigliotti

My Commission Expires 1/1/79

Richard L. Albrecht

RICHARD L. ALBRECHT